

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4
5 WENDY FORTUNATO,
6 Plaintiff,

2:13-cv-1503-JCM-VCF

7 vs.

REPORT & RECOMMENDATION

8 CAROLYN W. COLVIN, Acting Commissioner
9 of Social Security,
10 Defendant.
11

12 This matter involves Plaintiff Wendy Fortunato's appeal from Defendant Carolyn W. Colvin's
13 final decision denying Fortunato's social security benefits. (Compl. (#3) at 2:2-24¹). Before the court is
14 Fortunato's motion for reversal and remand (#11). The Commission filed an opposition (#15); Fortunato
15 did not reply. Also before the court is the Commissioner's unopposed cross-motion for affirmance (#14).
16 For the reasons stated below, the court recommends denying Fortunato's motion and granting the
17 Commissioner's motion.
18

19 **STANDARD OF REVIEW**

20 The Fifth Amendment prohibits the government from depriving persons of property without due
21 process of law. U.S. CONST. amend. V. Social security claimants have a constitutionally protected
22 property interest in social security benefits. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Gonzalez*
23 *v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990). Where, as here, the Commissioner of Social Security
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25 ¹ Parenthetical citations refer to the court's docket and administrative record.

1 renders a final decision denying a claimant's benefits, the Social Security Act authorizes the District
2 Court to review the Commissioner's decision. *See* 42 U.S.C. § 405(g); *see also* 28 U.S.C.
3 § 636(b) (permitting the District Court to refer matters to a U.S. Magistrate Judge).

4 The District Court's review is limited. The court examines the Commissioner's decision to
5 determine whether (1) the Commissioner applied the correct legal standards and (2) the decision is
6 supported by "substantial evidence." *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th
7 Cir. 2004); *Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005). Substantial evidence is defined as "more
8 than a mere scintilla" of evidence. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Andrews v. Shalala*,
9 53 F.3d 1035, 1039 (9th Cir. 1995).

10 Under the "substantial evidence" standard, the Commissioner's decision must be upheld if it is
11 supported by enough "evidence as a reasonable mind might accept as adequate to support a conclusion."
12 *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938) (defining "a mere scintilla" of evidence).
13 If the evidence supports more than one interpretation, the court must uphold the Commissioner's
14 interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). This means that the
15 Commissioner's decision will be upheld if it has any support in the record. *See, e.g., Bowling v. Shalala*,
16 36 F.3d 431, 434 (5th Cir. 1988) (stating that the court may not reweigh evidence, try the case *de novo*,
17 or overturn the Commissioner's decision if the evidence preponderates against it).

18 DISCUSSION

19
20 Fortunato's appeal presents one question: whether the Commissioner applied the right legal
21 standard and correctly discounted Fortunato's testimony regarding her subjective symptoms at stage
22 two. Before discussing this question, the court begins its analysis of Fortunato's appeal by reviewing the
23 Commission's burden at stage two.

1 **I. The Commissioner’s Burden at Stage Two**

2 To qualify for benefits under the Social Security Act, the claimant must demonstrate his or her
3 “inability to engage in any substantial gainful activity by reason of any medically determinable physical
4 or mental impairment which can be expected . . . to last for a continuous period of not less than 12
5 months.” 42 U.S.C. § 423(d)(1)(A); *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995), cert. denied,
6 517 U.S. 1122 (1996). When making this determination, the Commissioner engages in a five step
7 inquiry.

8 At step two—the only relevant step here—the claimant must prove that her impairment is
9 “severe,” which means that the impairment “significantly limits her physical or mental ability to do
10 basic work activities.” *See* 20 C.F.R. §§ 404.1520(c), 416.920(c). Under the *de minimis* step two
11 standard, “an impairment or combination of impairments may be found not severe only if evidence
12 establishes a slight abnormality that has no more than a minimal effect on an individual’s ability to
13 work.” *Webb v. Barnhart*, 433 F.3d 683, 686–87 (9th Cir. 2005).

14 The claimant’s subjective symptoms must be considered at this step. 40 C.F.R. § 404.1529;
15 *Smolen v. Chater*, 80 F.3d 1273, 1291 (9th Cir. 1996); *Lamell v. Colvin*, No. 12–05013–KAW, 2014
16 WL 282414, at *1 (N.D. Cal. Jan. 24, 2018). Symptoms are evaluated under a two-step analysis. SSR
17 96–7p. First, the Commissioner determines whether there is an underlying medically determinable
18 physical or mental impairment that could reasonably be expected to produce the individual’s pain or
19 other symptoms. *Id.*; *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc). Second, the
20 Commissioner must evaluate the intensity, persistence, and limiting effects of the individual’s symptoms
21 to determine the extent to which the symptoms limit the individual’s ability to do basic work. *Id.*
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23 In determining the credibility of the claimant’s statements regarding the intensity, persistence,
24 and limiting effects of his or her symptoms, the Commissioner must identify specific reasons for finding
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1 the statements credible or not credible. SSR 96–7p. These reasons must be supported by the evidence in
2 the record, and must be sufficiently specific to make clear to the individual and to any subsequent
3 reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight.
4 SSR 96–7p.

5 **II. Whether the Commissioner Properly Discounted Fortunato's Testimony at Stage Two**

6 Fortunato argues that “the ALJ did not conduct the mandated two step analysis.” (Pl.'s Mot. to
7 Remand (#11) at 9:2–3). The court disagrees. As discussed below, the ALJ applied the two-step
8 procedure and then identified four reasons for finding that Fortunato's testimony lacks credibility.

9 First, the ALJ correctly applied the two-step procedure. (*See* Admin. Rec. at 22). The ALJ
10 identified an underlying medically determinable impairment: Fortunato's fatigue, muscle cramps, lack
11 of mental clarity, and inability to focus. (*Id.*) Second, the ALJ evaluated the intensity, persistence, and
12 limiting effects of Fortunato's symptoms. (*Id.*) In doing so, the ALJ identified four reasons for
13 discrediting Fortunato's testimony. (*Id.* at 23–24). These included: (1) a three-year time gap between
14 Fortunato's diagnosis with thyroid cancer and her retirement, which happened to coincide with the onset
15 of the symptoms; (2) conflicting testimony regarding spending seventy percent of the day in bed for up
16 to three days while also conducting “normal activities of daily living” relative to running a household
17 and caring for two minor children; (3) conflicting testimony regarding “being unable to concentrate for
18 more than five minutes” while also being able to “pay attention for one hour” and follow instructions
19 “well”; and (4) the fact that the extent of her testimony appears “greater than expected in light of the
20 objective evidence of record.” (*Id.*)
21

22 Fortunato argues that the ALJ erred because “the regulations specifically prohibit rejecting
23 subjective pain testimony solely on the basis of objective medical evidence.” (Pl.'s Mot. to Remand
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1 (#11) at 10:12–13). As discussed above, the ALJ did not reject Fortunato’s testimony on that basis
2 alone. Therefore, no error occurred.

3 Fortunato further argues that “the objective medical evidence supports [her] testimony.” (*Id.* at
4 11:17). Even if true, this is irrelevant under the court’s substantial evidence standard. As stated above,
5 the court’s role is not to reweigh evidence or determine the truth. Under the “substantial evidence”
6 standard, the Commissioner’s decision must be upheld if it is supported by enough “evidence as a
7 reasonable mind might accept as adequate to support a conclusion.” *Consolidated Edison Co.*, 305 U.S.
8 at 197. If the evidence supports more than one interpretation, the court must uphold the Commissioner’s
9 interpretation. *Burch*, 400 F.3d at 679. As a result, this argument fails as a matter of law.

10 Fortunato’s motion to remand challenges the Commissioner’s decision on one ground: that “the
11 ALJ did not conduct the mandated two step analysis” when discrediting Fortunato’s testimony. (Pl.’s
12 Mot. to Remand (#11) at 9:2–3). As demonstrated above, the Commissioner did in fact conduct the
13 mandated two step analysis. Therefore, the court recommends denying Fortunato’s motion to remand.
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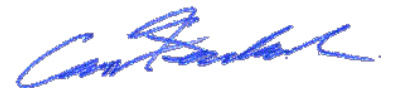
15 ACCORDINGLY, and for good cause shown,

16 IT IS RECOMMENDED that Plaintiff Wendy Fortunato’s Motion for Reversal (#11) be
17 DENIED.

18 IT IS FURTHER RECOMMENDED that the Commissioners motion for summary judgment
19 (#14) be GRANTED.

20 IT IS SO RECOMMENDED.

21 DATED this 24th day of March, 2014.

22
23 

24 CAM FERENBACH
25 UNITED STATES MAGISTRATE JUDGE